No. 10217.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH R. GREENWOOD, Administrator of the Estate of Charles H. Greenwood, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

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PETITIONER'S OPENING BRIEF.

The above entitled case has come before this Court on a petition for review of a decision of the United States Board of Tax Appeals [R. pp. 35 to 39] wherein the Board, by decision entered May 29, 1942, ordered and decided that a deficiency in estate tax in the amount of $18,491.76 existed against the above named petitioner [R. p. 34].

The petitioner filed the estate tax return involved in this case with the Collector of Internal Revenue for the District of Arizona [R. p. 16]. Thereafter, in July, 1940, the respondent delivered to the petitioner a notice of deficiency [R. pp. 8 to 13 and 16] from which the petitioner appealed by petition filed with the United States Board of

Tax Appeals on the 27th day of September, 1940 [Docket Entries, R. p. 1; pp. 3 to 13]. A copy of the petition was duly served on the respondent [Docket Entries, R. p. 1] and he thereafter regularly filed and served his answer [Docket Entries, R. p. 1; pp. 13 to 15]. A hearing on the merits was had before the Board sitting at Los Angeles, California, on the 23rd day of September, 1941 [Docket Entries, R. p. 2], and in regular order the Board, on April 3, 1942, promulgated its findings of fact and opinion [R. pp. 16 to 33] and in due course made and entered the decision in respect of which the review herein is sought.

Jurisdiction of the United States Board of Tax Appeals to review the deficiency found by the respondent is expressly conferred by Section 1101 of the Internal Revenue Code, which reads as follows:

> "The Board and its divisions shall have such jurisdiction as is conferred on them by chapters 1, 2, 3, and 4 of this title, by Title II and Title III of the Revenue Act of 1926, 44 Stat. 9, or by laws enacted subsequent to February 26, 1926."

And jurisdiction of this Court to review a decision of the Board is expressly conferred by Section 1141 of the Internal Revenue Code, which reads as follows:

> "(a) JURISDICTION.—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, Sec. 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, Sec. 347).

"(b) VENUE.—

"(1) IN GENERAL.—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia."

Statement of the Case and Questions Involved.

The issue presented in the instant case is whether all of the property in which the decedent, Charles H. Greenwood, had an interest at the time of death may properly be taxed in its entirety as property of his estate, or whether his wife had such a vested interest therein that only one-half of its value may be properly taken as the measure for purpose of federal estate tax.

The decedent and his wife, Albertine Greenwood, were married in 1899 and resided during the greater part of their married life in the State of New York [R. p. 16]. In the early part of 1927 they established residence in Tucson, Arizona, where they lived continuously until Mr. Greenwood's death on July 21, 1939 [R. pp. 16 and 17].

At the time of marriage neither the decedent nor his wife had any property, and aside from about $1,000.00 inherited by the wife in 1937 and an inheritance received from the decedent's mother in 1927, the amount of which was not ascertained herein, the estate in which the decedent had an interest at the time of death was acquired by his earnings [R. pp. 17 and 20]. Neither engaged in remunerative occupation nor employment after moving to Arizona.

None of the property of the parties was community property at the time they became residents of Arizona, but shortly thereafter, in 1928, they rented a safe deposit box under a rental agreement wherein they declared equal ownership as joint tenants [R. pp. 18 and 19] and they thereafter kept all their securities and documents of title therein [R. p. 19] and treated the estate involved herein as property belonging to them equally, and in their discussions of their property relations it was always referred to as community property [R. pp. 21 to 23]. Their two bank accounts in Tucson, Arizona, were kept in both names [R. pp. 19 and 20] and all real estate owned by them was held in the name of both [R. p. 22]. (The real estate, however, is not involved in the instant case.) All other property was carried in the name of the decedent [R. p. 22]. It was their understanding and intention to hold the estate as community property and it was mutually understood that the survivor should take all by virtue of the will of the other, and their wills so provided [R. p. 23].

All property involved in the instant case is personalty, consisting principally of securities and cash [R. p. 24].

In filing the estate tax return the petitioner herein reported the estate as community property and computed a tax upon one-half of the total net value thereof. The respondent thereafter determined a deficiency of $18,501.28 [R. p. 16] on the ground that the entire estate was the separate property of the decedent at the time of his death [R. p. 23].

The petitioner contends that the estate became community property by virtue of the facts found by the Board and the law of the State of Arizona, while the respondent has contended that the estate remained the sole and separate property of the decedent. The Board has concluded that all of the estate involved became joint tenancy prop-

erty because of the safe deposit box rental agreement and the application of state law [R. pp. 23 to 33].

It being conceded at the outset that substantially all of the estate was acquired by the parties while they resided in the State of New York, and by virtue of the law of that state was originally the property of the decedent, the questions now presented are as follows:

1. Under the law of the State of Arizona, may a husband and wife, residing therein, transmute the separate personal property of the husband to the community property of both by mutual understanding and intention to do so?

And, if so, does such transmutation take effect when husband and wife bring separate personal property of the husband to Arizona and agree between themselves that half of it is the wife's, and always refer to it as community property, and in all respects treat it as such?

2. Under the law of the State of Arizona, where a husband and wife rent a safe deposit box from a banking institution and by writing on the signature card pertaining thereto declare and represent that they own as joint tenants, with right of survivorship, all the property of every kind then within said box or to be placed therein, and at all times thereafter refer to such property as community property equally owned by both, and make wills bequeathing their respective interests, and otherwise handle the property as community property, do stocks, bonds and other documents of title written in the name of the husband alone, deposited in said box, become the joint tenancy property of both and upon his death pass to her by right of survivorship?

Assignments of Error.

I.

The Board of Tax Appeals erred in concluding that the property involved was held by the decedent and his wife as joint tenants, because its findings of fact do not support its opinion and decision promulgated and entered, in that the findings show that the stocks, bonds and other documents of title were held in the name of the decedent [R. p. 22]; that he and his wife each recognized equal interests [R. pp. 18, 19, 22 and 23]; that they always referred to the property as community property [R. pp. 21 and 23]; that they made wills devising and bequeathing their respective interests [R. p. 23]; that the grants do not vest title in the survivor, and the transfers were made directly from the husband to himself and wife.

II.

The Board of Tax Appeals erred in its opinion and decision in that it did not conclude upon its findings of fact that the property involved was community property, because the findings show that the decedent and his wife understood that they owned equal interests therein [R. pp. 18, 19, 22 and 23], and they always referred to the property as community property [R. pp. 21 and 23] and so treated it for all purposes.

ARGUMENT.

POINT I.

Upon the Death of Either Husband or Wife Only One-half of the Community Property in Which the Parties Had Equal Interests Is Subject to Federal Estate Tax.

POINT II.

The Nature of Property and the Respective Interests of Husband and Wife Therein Are Determined by the Law of the State in Which the Husband and Wife Reside, and Upon the Death of Either, That Law Controls in Ascertaining the Taxable Estate of the Decedent.

It is believed that no controversy is presented in the instant case by the two foregoing propositions of law as it appears that the Board of Tax Appeals proceeded upon those points in rendering its opinion and decision, citing *Black v. Commissioner,* 114 Fed. (2d) 355, and *Talcott v. United States,* 23 Fed. (2d) 897 [R. p. 24].

POINT III.

Under the Law of the State of Arizona, the Interests of Husband and Wife in Community Property Are in All Respects Equal, the Husband Having No Title Superior to That of the Wife.

In the instant case the decedent was a resident of the State of Arizona at the time of his death, so we are here governed by the laws of that state in determining the property interests of himself and wife. Under the community

property system there obtaining, the equal interests of husband and wife have long been recognized. On that point the Supreme Court of Arizona has said:

> "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in the matrimonial gains. * * *
>
> "The law, in giving this power to the husband during coverture to dispose of the personal property, does not do this in recognition of any higher or superior right that he has therein, but because the law considers it expedient and necessary in business transactions affecting the personalty to have an agent of the community with power to act."
>
> *La Tourette v. La Tourette,* 15 Ariz. 205, 206, 137 Pac. 426, at 428.

As in the case of Points I and II, it is apparent that the Board has not questioned this proposition of law in its opinion and decision, but we present these propositions as a step toward the real issue.

POINT IV.

Under the Law of the State of Arizona, Where Either Husband or Wife Has Separate Property and It Is Their Intention to Treat Such Property as the Community Property of Both it Becomes Community Property in Accordance With Their Intent; and in so far as Personal Property Is Concerned it Is Not Necessary That Such Transmutation be Expressed Formally, Either Verbally or in Writing, as Long as it Can be Fairly Inferred From the Circumstances That a Community Interest Was Intended.

It seems well established that, contrary to the doctrine of the common law, husband and wife residing in the State of Arizona may contract with each other concerning the interest of either in property. (*Luhrs v. Hancock,* 6 Ariz. 340, 57 Pac. 605; *Estate of Baldwin,* 50 Ariz. 265, 71 Pac. (2d) 791.) Clothed with this power it follows that they may change the community property of both to the separate of either, and the separate property of one to the community property of both. Upon these points it appears that the courts of Arizona, Washington and California are in accord, and the law of Washington and California may be taken as the law of Arizona upon the points we are here discussing, a fact of importance in view of the small volume of litigation of that nature brought before the Supreme Court of Arizona.

Citing with approval the case of *Volz v. Zang,* 113 Wash. 378, 194 Pac. 409, the Supreme Court of Arizona has said:

> "When spouses have treated the income from their separate property as community, and it was their intent that it should become community, the character

of the income changes in accordance with their intention."

Rundle v. Winters, 38 Ariz. 239, at 245, 298 Pac. 929, at 931.

And in the case of *Volz v. Zang, supra,* the Supreme Court of Washington pointed out that the laws of that state gave to husband and wife a right to deal in every possible manner with their property, and relying upon California authorities it said:

"* * * In *Yoakam v. Kingery,* 126 Cal. 30, 58 Pac. 324; *In re McCauley's Estate,* 138 Cal. 432, 71 Pac. 458, and *Title Ins. & Trust Co. v. Ingersoll,* 153 Cal. 1, 94 Pac. 94, the Supreme Court of California has held that a deed from husband or wife was sufficient 'to transmute the separate estate of either of them into community property, if it was properly executed.' * * *"

"Our statutes are not identical with those of California: but under our statutes, the right of husband and wife are no more restricted than those enjoyed under the California statutes. * * *" (Certain statutes cited.)

"It would seem from these statutes that the husband and wife have been given a right to deal in every possible manner with their property. Broad, general powers are given which must include the lesser and more restricted powers. Moreover, this court has already indicated that the husband or wife may change the status of separate property to community property * * *"

Volz v. Zang, 113 Wash. 378, at 380 and 381, 194 Pac. 409, 410.

The respondent has heretofore recognized the rule that husband and wife residing in Washington may transmute separate personal property to community property by verbal agreement (G. C. M. 19248, XVI-46-9036; Vol. 3, 1937 C. C. H., 8344), and the above quoted statement from the case of *Rundle v. Winters* can leave no doubt that husband and wife can change separate personalty to community by mere intention to do so. Many cases in point have come before the courts of last resort in California and the rule hereinbefore stated has been invariably affirmed. Thus it has been said:

> "The fact that each of them had at their marriage a few hundred dollars as separate property is not controlling as by mere verbal agreement these sums could have been transmuted into community property."
>
> *Estate of Kelpsch,* 203 Cal. 613, at 616, 265 Pac. 214, at 215.

and,

> "In the present case there was a meeting of the minds and any form of expressed words, either spoken or written, that the property was to be considered community property was sufficient."
>
> *Estate of Wahlefeld,* 105 Cal. App. 770, at 776, 288 Pac. 870.

and again,

> "It clearly appears from the foregoing authorities that the agreement or understanding between the parties is not required to be in any particular words and need not be attended with any particular formality as long as it may be fairly inferred from all of

the circumstances in evidence that a community interest was intended by the parties."

Estate of Sill, 121 Cal. App. 202, at 204, 9 Pac. (2d) 243, at 244.

In the case of *Estate of Kelpsch, supra,* there was involved the title to certain property brought by husband and wife, about five years before her death, from the state of Illinois, a common law state, to the state of California, a community property state. It appears that after becoming residents of California they retained certain investments in their joint names, and made others, and kept their bank accounts in the name of the wife alone. It further appears that she took control of their business affairs because of her better ability to handle such matters, and that she often spoke of their relation as a partnership. The Supreme Court affirmed the order of the trial court holding all property to be community.

In the case of *Estate of Sill, supra,* it was contended by the appellant that certain real estate held in the name of the decedent was decedent's separate property. He had paid the greater part of the purchase price and had taken title in his name alone and immediately thereafter assured his wife that "It is just as much yours as it is mine; this is our home." In affirming the judgment of the trial court, the District Court of Appeal said (page 205):

"While the parties did not formally agree in precise words that the property should be community property, it is a fair inference from all the circumstances that such was their intention and understanding."

In the case here presented it is apparent that the decision of the Board is based upon its conclusion that the

property involved was changed from the separate property of the husband to the joint tenancy property of himself and wife by virtue of the safe deposit box rental agreement set forth in its findings of fact [R. pp. 18 and 19], but just what its conclusion and decision would have been in the absence of that document is not clear. Leaving that rental agreement for later discussion, it is submitted that the pertinent facts set forth in the findings afford no avenue of escape from the conclusion that a community property interest was understood, intended and effected. It is herein shown that the decedent and his wife understood that each had an equal interest [R. pp. 22 and 23], and that they considered the property to be community [R. pp. 21 to 23]. The fact that the securities were held in the name of the decedent alone is of no material importance, for such is the practice in all community property states, the husband alone having power to dispose of community personalty. To join the wife in title would only impair the facility of negotiation. In the case of real estate, however, the wife must join in conveyance, so it is worthy of note that the real estate owned by the decedent and his wife was held in both names [R. p. 22], and that the respondent has not contended that it was not community property. The facts that the decedent turned over to his wife a monthly allowance for household expenses [R. p. 20]; that he received the income and handled it without control by the wife [R. p. 21]; that he gave her no accounting [R. p. 21]; and that he prepared both income tax returns [R. p. 22] are all consistent with the community property theory and contrary to a joint tenancy theory concluded by the Board. And the facts that both husband and wife considered her interest equal to his [R. pp. 22 and 23]; that they spoke of the

property as community property [R. pp. 21 to 23]; that they kept both active bank accounts in both names [R. p. 20]; that she joined in renting the safe deposit box and kept a key thereto [R. pp. 19 and 21]; and that they had like wills each naming the other as beneficiary [R. p. 23] are entirely inconsistent with the separate property theory contended by the respondent.

It is submitted, therefore, that if this Court is of the opinion that a joint tenancy was not created by the decedent and his wife, it should conclude that the property involved became community property under Arizona law.

We now pass to a discussion of the joint tenancy issue.

POINT V.

Joint Tenancy Is Not a Favorite of the Law of Arizona, and Where Property Is Held by a Husband and Wife by an Instrument Expressly Describing Them as Joint Tenants With Right of Survivorship Such Property Will be Deemed to be Community Property if the Parties so Intend.

Joint tenancy with its attendant right of survivorship has never been a favorite of the law of Arizona and statutes abolishing it in most cases have long been in force. Section 1102, Revised Statutes of 1913, read as follows:

> "Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owners, but shall descend to and be vested in the heirs and legal representatives of such deceased joint owner, in the same manner as if his interest had been severed and ascertained."

However, sections 4708 and 4709 of the same Revised Statutes authorized creation of joint tenancies in real property, notwithstanding the inclusion of that class of property within the scope of section 1102. Sections 4708 and 4709 became section 2777 of the Revised Code of Arizona, 1928, and the aforesaid section 1102 became section 986 of the 1928 Code. The language of section 986 remains unchanged, and is as follows:

> "*Right of survivorship abolished.* Where two or more persons hold property jointly and one joint owner dies before severance, and the grant or devise does not expressly vest the estate in the survivor, the interest in the estate of the owner dying shall not survive to the remaining joint owners but shall descend to the heirs of the deceased joint owner as though his interest had been severed and ascertained."

It is often stated that it was the object of the legislation in preparing the Revised Code of 1928 to change the legal meaning of the existing law as little as possible, and considering the rule of construction stated by the Supreme Court of Arizona in the case of *Estate of Sullivan,* 38 Ariz. 387, 300 Pac. 193, and the words "grant or devise" of the statute, ordinarily used in connection with real property, it would seem doubtful if personal property may in any case be the subject of joint tenancy.

In any case, however, it is clear that even where husband and wife are designated as joint tenants with right of survivorship the property is deemed to be community if the grantees so intend. On that point the Supreme Court of Arizona has said:

> "It should not be overlooked on the one hand that the doctrine of survivorship is not a favorite of the

> law, in fact, has been abolished in this state in most instances, section 986, *supra*, and upon the other, that the community property principle is too deeply rooted in the policy of this state to permit it to be set aside except in those cases in which the law clearly permits it and the parties so intend."
>
> *Estate of Baldwin*, 50 Ariz. 265, at 275, 71 Pac. (2d) 791, at 795.

In the instant case the findings of fact show that the parties intended to hold the property as community property and not as joint tenancy property [R. pp. 21, 22 and 23]. The decedent always referred to the property as being community [R. p. 21] and he and his wife each made a will devising and bequeathing their respective interests therein [R. p. 23], and they therefore did not intend to take by right of survivorship. The term community property has a well defined meaning even in the mind of laymen and it cannot be reasonably concluded that a man with the knowledge and business ability of the decedent in the instant case, a resident of the State of Arizona for many years, would refer to property as community property and make a will devising and bequeathing his interest therein when in fact he intended to hold the property as joint tenancy property which would vest in his wife upon his death without probate and irrespective of the provisions of the will.

The Board relies upon the *Baldwin* case, *supra*, to support its conclusion that a joint tenancy may be created between husband and wife [R. p. 28]. It is worthy of note, however, that in that case the property involved was real estate taken by the husband and wife by joint tenancy deed from a third person, while in the present case we are

concerned with personal property which came into the community directly from the husband, a point which will be later discussed herein. But even under the rule of that case, as shown above, the property will nevertheless be considered community if it is clearly the intention of the parties to do so. Speaking with reference to the question of joint tenancy with right of survivorship involved in the *Baldwin* case, wherein it was held that a joint tenancy in real estate could be created by the husband and wife if the grant expressly stated and they so intended, the Supreme Court of Arizona in the case of *Henderson v. Henderson*, 121 Pac. (2d) 437, said "Whether the holding in that case was correct is, the court now feels, rather doubtful." In other words, the Supreme Court of Arizona has said that it now feels that the *Baldwin* case is unsound in so far as it permits joint tenancy with right of survivorship between husband and wife in any case, and that it decides the *Henderson* case only upon the rule of *stare decisis* because of possible injustice that might otherwise be imposed upon innocent persons taking property under the authority of the *Baldwin* case.

In view of the foregoing pronouncements by the Supreme Court it would not seem logical to conclude that that court would, under facts similar to those in the present case, hold that a joint tenancy with right of survivorship was created. In other words, it would not seem reasonable to assume that the Supreme Court of Arizona would disregard the evidence showing that the decedent and his wife considered the property to be community property and contrary to its pronouncement of policy conclude that joint tenancy with right of survivorship existed.

POINT VI.

Under the Law of the State of Arizona, Where Two or More Persons Hold Property as Joint Tenants, and the Grant or Devise Does Not Expressly Vest Title in the Survivor, the Interest of a Joint Owner Passes to His Heirs and Beneficiaries Upon His Death as Though Severed Prior Thereto.

Section 986 of the Revised Code of Arizona, 1928, *supra,* clearly states that in no case may a joint tenancy with right of survivorship be created unless the grant specifically vests title in the survivor. With that section in mind, and putting aside other questions of law discussed and to be discussed, the question might be asked, What in the instant case is the grant? Is it the safe deposit box rental agreement, or are the stock certificates and other documents of title grants?

The Board seems to conclude that the safe deposit box rental agreement is the grant within the meaning of the statute. If that conclusion is correct, then it would naturally follow that the mere taking of a stock certificate from the box would change its title status, because it is clear that an oral joint tenancy cannot exist under Arizona law, and it is equally clear from the facts in the instant case that all of the certificates and other documents of title to personal property were in the name of the decedent alone [R. p. 22]. Such a conclusion seems unsound. It seems obvious, therefore, that the stock certificates and other documents were grants within the meaning of the statute, and not bearing the name of the decedent and his wife as joint tenants with right of survivorship they fall into the category of community property.

POINT VII.

Under the Law of the State of Arizona, a Joint Tenancy With Right of Survivorship Can in No Case Be Created by a Transfer From One Owner to Himself and Another as Joint Tenants With Right of Survivorship.

It seems to be the established rule of the common law that a joint tenancy cannot be created by one person conveying his own property to himself and another as joint tenants, because of lack of the essential unities. (*Corpus Juris*, Volume 33, Sec. 9, page 907.) That rule, which does not seem contrary to the rule stated in the *Baldwin* case wherein the unities were not in question, would appear to be the law of Arizona. Section 3043 of the Revised Code of Arizona, 1928, the code applicable in the instant case, reads as follows:

> "*Common law adopted as far as applicable.* The common law, so far only as it is consistent with, and adapted to the natural and physical conditions of this state, and the necessities of the people thereof, and not repugnant to, or inconsistent with, the constitution of the United States, or the constitution or laws of this state, or established customs of the people of this state, is hereby adopted and shall be the rule of decision in all courts of this state. (Sec. 9, Ch. 10, L. '07; 5555, R. S. '13.)"

The cases cited by the Board to sustain a conclusion that the property involved herein was joint property with right of survivorship are all California cases except one and that one is a New York case [R. pp. 29 to 31]. It would seem that neither could be relied upon as authority in construing the law of Arizona. Joint tenancy has

always been favored by the law of California, and Section 683 of the Civil Code of that state was enacted many years ago and has been amended until it now specifically permits the creation of a joint tenancy by transfer from a sole owner to himself and others. So it can be readily seen that that policy is contrary to the policy obtaining in the jurisdiction of Arizona. The New York case of *Colson v. Baker*, cited by the Board [R. p. 31], is definitely a minority holding in the United States, as shown by the citations and discussion in 62 A. L. R. 514. It is clear that the majority holding in the United States is that the four unities must co-exist unless that rule is abrogated by statute. (*Deslauriers v. Senesac*, 331 Ill. 437, 163 N. E. 327; *Breitenback v. Schoen*, 183 Wis. 589, 198 N. W. 622; *Wright v. Knaff*, 183 Mich. 656, 150 N. W. 315.)

In the instant case there is no question that the decedent was the owner of substantially all the property involved, in one form or another, when he and his wife became residents of the State of Arizona, and he was never divested of title in any respect whatsoever prior to transmutation to himself and wife equally. It would therefore seem unreasonable to assume that the Supreme Court of the State of Arizona would turn back the rule of the common law, override its pronounced policy, disregard the presumption favoring community property, follow the rule of a minority and conclude that the property herein involved was held jointly with right of survivorship and not as community property.

Conclusion.

In conclusion, it is submitted that the points of law hereinbefore discussed and the findings of fact promulgated by the Board sustain the petitioner's assignments of error and support his contention that the property involved was community and not joint tenancy property. It is therefore respectfully asked that this Court reverse the decision of the Board and hold that all property involved was the community property of the decedent and his wife at the time of the death of the decedent, only one-half of which is subject to federal estate tax.

Respectfully submitted.

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